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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS GONZALEZ,

Defendant and Appellant.

B260415

(Los Angeles County
Super. Ct. No. KA048390)

APPEAL from an order of the Superior Court of Los Angeles County, Roy G. Delgado, Judge. Reversed with directions.

Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jose Luis Gonzalez appeals from an order finding him in violation of probation, ordering that his probation remain revoked, and imposing sentence for his 2000 conviction of continuous sexual abuse of a child (Pen. Code, § 288.5, subd. (a)). He contends the order must be reversed because there is no substantial evidence he willfully violated the conditions of his probation. We agree the trial court erred in finding him in violation of probation and reverse with instructions to the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 2000, defendant was charged with the continuous sexual abuse of a child under 14 years of age, to which he entered a no contest plea on May 24. On June 26, imposition of sentence was suspended and, pursuant to the plea agreement, defendant was placed on five years' probation conditioned on service of 365 days in county jail, with credit for time served.

As further conditions of probation, the court ordered defendant to take specific actions to commence supervision by the probation department: “[w]ithin 48 hours after release from county jail, return to this building, report to the probation department located [in the courthouse]”; “[c]ooperate with your probation officer in a plan for drug and alcohol abuse counseling [and] psychiatric counseling”; “[s]ubmit to periodic anti-narcotic tests or alcohol tests as directed by your probation officer”; “attend outpatient counseling with the L.A. County Department of Mental Health, Adult Forensic Services, for sex abuse

counseling”; “seek and maintain training, schooling, or employment, as approved by probation; [and k]eep your probation officer advised of your residence at all times.” Defendant was also ordered to “register for life as a sexual offender” and was instructed “that registration must take place within five working days after your release from county jail. . . . You’re to register at the El Monte Police Department right across the street from the courthouse.” The court also ordered defendant to pay various forms of restitution: \$200 to the probation office pursuant to Penal Code section 1202.4; \$300 to the El Monte Police Department for the medical examination of the victim; and restitution to the victim for any psychiatric counseling she might need in the future.

The court advised defendant: “If you leave the country, do not reenter the United States illegally. If you do return, report to the probation officer within 48 hours and present documents which prove you’re in the United States legally.”

Defendant was released to the Immigration and Naturalization Service on December 27, 2000 and deported to Mexico. On January 29, 2001, the court revoked his probation and issued a bench warrant.

On August 21, 2013, defendant was arrested in Salt Lake County, Utah, on drug charges. Prosecution was declined, and defendant was transported to Los Angeles County on September 10, 2013.

The probation officer recommended that probation remain revoked and sentence be pronounced and imposed. The probation officer noted defendant was in violation of probation because he provided no proof of having participated in court-ordered drug/alcohol counseling; upon his reentry into the United

States, he did not report to the probation officer and provide proof of having entered the United States legally; he did not register as a sex offender; he did not enroll in outpatient counseling with the Los Angeles County Department of Mental Health; and he made no payments toward his financial obligations. In addition, the report noted, defendant's arrest in Utah in 2013 might place him in violation of the condition that he not possess narcotics. The report stated that it was unknown when defendant reentered the United States after his deportation.

The probation violation hearing was continued a number of times, until July 9, 2014. On July 2, defendant filed a petition for writ of error coram nobis, challenging the validity of his no contest plea.

At the probation violation hearing held on September 9, 2014, the court found it had no jurisdiction to hear a coram nobis petition on the grounds presented. Following argument on the probation violation, the court found defendant "in violation of his probation. Defendant did not comply with any conditions of probation."

At the sentencing hearing on October 21, 2014, the court noted there were no mitigating factors justifying probation, explaining: "He gets put on probation. He was ordered to come back to this country to report to probation, never did. Last contact with the police was in the year 2013 for a narcotics type of offense regarding cultivation. Never registered as a sex offender. Never did anything when he was back in the country, however, and didn't comply with any of those terms of probation" The court did, however, impose the low term of six years.

Defendant filed a timely notice of appeal, challenging both the denial of the petition for a writ of error coram nobis and the court's finding of probation violations and subsequent resentencing. Because defendant does not pursue his arguments relating to the denial of the writ petition, we consider that aspect of the appeal waived.

DISCUSSION

A. *Standard of Review*

Penal Code “[s]ection 1203.2, subdivision (a), authorizes a court to revoke probation if the interests of justice so require and the court, in its judgment, has reason to believe that the person has violated any of the conditions of his or her probation.

[Citation.] “When the evidence shows that a defendant has not complied with the terms of probation, the order of probation may be revoked at any time during the probationary period.

[Citations.]” [Citation.]’ [Citation.] The standard of proof in a probation revocation proceeding is proof by a preponderance of the evidence. [Citations.] ‘Probation revocation proceedings are not a part of a criminal prosecution, and the trial court has broad discretion in determining whether the probationer has violated probation.’ [Citation.]” (*People v. Urke* (2011) 197 Cal.App.4th 766, 772, fn. omitted.)

“We review a probation revocation decision pursuant to the substantial evidence standard of review [citation], and great deference is accorded the trial court’s decision, bearing in mind that ‘[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court. [Citations.]’ [Citation.]”

(*People v. Urke*, *supra*, 197 Cal.App.4th at p. 773.) Under this standard, discretion is abused when there is no substantial evidence to support the trial court’s findings. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 997; see also *People v. Powell* (2011) 194 Cal.App.4th 1268, 1284, fn. 6.) Additionally, “[a] trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand.” [Citation.]’ [Citations.]” (*Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1493-1494; see *People v. Hendrix* (2013) 214 Cal.App.4th 216, 239.)

B. *Revocation of Probation*

“[S]ummary revocation of probation preserves the trial court’s authority to adjudicate a claim that the defendant violated a condition of probation during the probationary period.” (*People v. Leiva* (2013) 56 Cal.4th 498, 515 (*Leiva*)). The purpose of the subsequent formal probation revocation hearing “is to give the defendant an opportunity to require the prosecution to prove the alleged violation occurred and justifies revocation.” [Citation.]” (*Ibid.*, italics omitted.) Therefore, following the summary revocation of probation, the trial court retains the authority “to decide whether there has been a violation during the period of probation and, if so, whether to reinstate or terminate probation.” [Citation.]” (*Id.* at pp. 515-516, fn. and italics omitted.) “Accordingly, a trial court can find a violation of probation and then reinstate and extend the terms of probation ‘if, and only if, probation is reinstated based upon a violation that occurred during the unextended period of probation.’ [Citation.]” (*Id.* at p. 516.) If “the court finds there has been no violation during the period of probation, there is no need for further

jurisdiction. And where . . . the term of probation has expired, the defendant is also entitled to an order discharging him from probation. [Citation.]’ [Citation.]” (*People v. Burton* (2009) 177 Cal.App.4th 194, 200, italics omitted.)

The trial court “may not revoke probation unless the evidence supports ‘a conclusion [that] the probationer’s conduct constituted a willful violation of the terms and conditions of probation.’ [Citation.] Where a probationer is unable to comply with a probation condition because of circumstances beyond his or her control and [the] defendant’s conduct was not contumacious, revoking probation and imposing a prison term are reversible error. [Citation.]” (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295.)

C. *Analysis*

Defendant contends the probation revocation order must be reversed because there is no substantial evidence he violated probation during the probationary period, and there is no substantial evidence any violation of probation was willful. We agree, as this case falls squarely within the holding of *Leiva*, requiring evidence that the alleged violation took place during the unextended probation period before a court can revoke or reinstate probation. We discuss *Leiva* in some depth, as the decision carefully examines the consequences of deportation and reentry on probation revocation proceedings such as this.

In *Leiva*, the defendant was placed on three years’ probation on April 11, 2000. The terms and conditions of probation required that the defendant “report to his probation officer within one business day of his release from custody and not reenter the country illegally if he left voluntarily or was

deported. Because [the] defendant was not a legal resident of the United States, he was deported to El Salvador on the day he was released from jail.” (*Leiva, supra*, 56 Cal.4th at p. 502.) As here, within a year the defendant failed to appear at a probation violation hearing; the trial court summarily revoked his probation based on his failure to report to his probation officer and issued a bench warrant. The court apparently was unaware that the defendant had been deported. (*Ibid.*)

In 2008, the defendant was arrested on the outstanding bench warrant following a traffic stop. The probation officer’s report indicated the defendant had not reported for probation supervision because he had been deported, and he returned to the United States illegally in 2007. (*Leiva, supra*, 56 Cal.4th at p. 503.) The trial court found a probation violation based on the defendant’s failure to report to his probation officer upon his return to the United States in 2007. The court reinstated and extended probation. (*Ibid.*) The defendant was again deported in 2009, and the court thereafter again summarily revoked his probation and issued a bench warrant based on his failure to report to his probation officer. (*Id.* at pp. 503-504.)

The defendant reentered the United States illegally later in 2009 and was arrested on the outstanding bench warrant. (*Leiva, supra*, 56 Cal.4th at p. 504.) The trial court held a probation violation hearing and found the defendant violated his probation by entering the United States illegally in 2009. It ordered probation revoked and sentenced the defendant to prison. (*Ibid.*)

On appeal, the defendant contended “the trial court lacked the authority to reinstate and extend his probation as of 2007, after the expiration of the original three-year probationary

period, because the noticed basis for revocation was not sustained and no other violation was proved to have occurred during the three-year probationary period,” and “because the February 13, 2009 order extending probation was invalid, the trial court lacked authority to impose a prison sentence in 2009 based on conduct that occurred later in 2009.” (*Leiva, supra*, 56 Cal.4th at p. 505.) The Supreme Court agreed, concluding that following the summary revocation of probation in 2001 “the trial court . . . retain[ed] the authority to adjudicate a claim that the defendant violated a term of probation *during* the court-imposed period of probation” only. (*Id.* at p. 518.)

Here, the probation officer noted defendant was in violation on several bases, including that he provided no proof of having participated in court-ordered counseling; upon his reentry into the United States, at an unknown time, he did not report to the probation officer and provide proof of having entered the United States legally; he did not register as a sex offender; he made no payments toward his financial obligations; and his arrest in Utah might place him in violation of the condition that he not possess narcotics. The trial court found defendant was in violation of his probation because he “did not comply with any conditions of probation.” At the sentencing hearing on October 21, 2014, the court further explained that after defendant was placed on probation, “[h]e was ordered to come back to this country to report to probation, never did. Last contact with the police was in the year 2013 for a narcotics type of offense regarding cultivation. Never registered as a sex offender. Never did anything when he was back in the country, however, and didn’t comply with any of those terms of probation”

Under *Leiva*, defendant's probation could not be revoked based on his arrest for a narcotics-related offense that occurred after the end of the probation period. (*Leiva, supra*, 56 Cal.4th at p. 518.) A revocation of probation also could not be based on his reentry into the country illegally if that occurred after the expiration of his original five-year probation period, or on any other alleged violation that took place after the expiration. The prosecution bears the burden of proving a violation of a condition of probation by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 444-445.) Here, there was no evidence before the court to support a finding that defendant reentered the country *during* the probation period. The only evidence in the record about how long defendant remained out of the country was contained in defendant's declaration in support of the writ petition, wherein he stated that "I remained in Mexico for over 10 years since I was deported in 2001." Because the court revoked defendant's probation based on his failure to comply with "any conditions of probation," the court may have impermissibly included in this finding violations that occurred after the five-year probation period had ended.

The trial court also committed reversible error by failing to determine whether defendant willfully failed to comply with the other terms of probation within the five-year period, before revoking or reinstating probation based on non-compliance. Defendant argues that his failure to comply with various aspects of his probation—reporting to probation, registering as a sex offender at the local police station, or enrolling in counseling at the county mental health department—could not be willful because he was deported immediately upon his release from custody. We are persuaded by the analysis in *People v. Galvan*

(2007) 155 Cal.App.4th 978, 983-984 (*Galvan*), that reversal is warranted under these circumstances.

In *Galvan*, the trial court found the defendant had violated probation by failing to report to probation within 24 hours of his release from jail. The defendant there argued that the court abused its discretion by finding a violation and revoking his probation when he was deported immediately after his release from jail. This court agreed, holding that a defendant's immediate deportation to Mexico following his release from county jail "demonstrates that his failure to report within 24 hours was not willful." (*Galvan, supra*, 155 Cal.App.4th at p. 984.) The court observed that the probation conditions imposed on the defendant, as in the present case, directed him to take steps in person at specific and identifiable locations in Los Angeles County. Further, the defendant was not "informed he could comply with the reporting requirements in any way other than showing up in person." (*Id.* at p. 985, fn. 5.) The court concluded that "a reasonable person in [the defendant's] position would have assumed that, in these circumstance, the 24-hour reporting requirement would be excused." (*Ibid.*) Hence, the defendant's failure to report could not be considered "the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court," the standard the People must prove to establish a willful violation of probation. (*Ibid.*)

Galvan drew support from two earlier Court of Appeal opinions, which recognized the impracticality and jurisdictional obstacles to foreign enforcement of probation terms in affirming the denial of probation to defendants facing deportation. (*People v. Espinoza* (2003) 107 Cal.App.4th 1069 [upholding denial of Proposition 36 probation to a drug offender who was subject to

deportation]; *People v. Sanchez* (1987) 190 Cal.App.3d 224 [court may consider likelihood of deportation in determining terms of probation].) Those opinions concluded that “California authorities have no effective means to evaluate or certify treatment programs based in other jurisdictions. Moreover, no California court can lawfully compel a noncitizen to attend a drug treatment program in his country of origin. Our probation departments cannot force foreign treatment providers to make the reports and notifications required by [Proposition 36]. [Citation.] Our courts lack jurisdiction to enforce their probation conditions or to remand the defendant into custody on foreign soil.” (*Espinoza, supra*, at p. 1076; see *Sanchez, supra*, at p. 231 [“Obviously, a convicted illegal alien felon, upon deportation, would be unable to comply with any terms and conditions of probation beyond the serving of any period of local incarceration imposed”].) These cases, recognizing the unique situation created for deported defendants, support our determination that defendant reasonably believed he was excused from registering as a sex offender and with the probation department when he was physically deported immediately upon his release from county jail.

The People argue that defendant could have complied with certain of the orders, even if living in a foreign country during the entirety of his probation, e.g., the requirement that he provide his address or that he participate in alcohol or substance abuse treatment. As no such evidence was presented at the trial court, we cannot consider it here. But even if the People were to offer such evidence at the new probation violation hearing, such evidence would be insufficient to establish a willful violation in this case, as both of those provisions were predicated on

defendant first registering with the probation department in person at the courthouse. Because he was immediately deported to Mexico and could not comply with that initial registration requirement, it was impossible for him to strictly comply with the other terms, even remotely. We therefore hold that defendant's failure to register with the probation officer within 48 hours of his release from custody, his failure to register as a sex offender "at [his] local police department" within five days and his failure to enroll in a county mental health program were not "willful." Obviously, if evidence establishes that defendant actually reentered the country within the five-year period, he arguably could have complied with that portion of the order that he register with the probation department within 48 hours of reentry and complied with other aspects of his probation to be supervised by the department; his failure to do so could be deemed willful, upon appropriate findings by the court.¹

The People contend that this court should disregard *Galvan* and instead follow *People v. Campos* (1988) 198 Cal.App.3d 917, 923, which held, on similar facts, that "[a] defendant who is deported while on probation may be found in violation of that probation for failure to report to the probation department although his deportation makes it impossible for the defendant to fulfill this condition of his probation." *Galvan* declined to follow

¹ There are other terms of probation with which defendant could have complied regardless of deportation, e.g., the condition that defendant have no contact of any kind with the victim, that he not "use or possess any narcotics" and that he not "own, use, or possess any firearm." However, there is no evidence in the record on appeal that defendant violated any of these conditions at any time.

Campos, as it was decided prior to *People v. Zaring* (1992) 8 Cal.App.4th 362, a case that explored the “willful” requirement in considerable depth, and did not explain adequately how failure to report in a deportation situation could be willful. (*Galvan, supra*, 155 Cal.App.4th at p. 985, fn. 4.) *Campos* is further undermined by the Supreme Court’s later decision in *Leiva*, which was premised on the proposition announced in *Galvan* that “a probationer who is deported when released from custody cannot be found to be in willful violation of probation for failing to report to the probation office.” (*Leiva, supra*, 56 Cal.4th at p. 517.)

Moreover, as defendant points out, insofar as revocation of probation was based on the failure to make court-ordered restitution payments, the trial court was required to make findings that defendant willfully failed to make the payments and he had the ability to pay. (Pen. Code, § 1203.2, subd. (a); *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1393-1394; *People v. Self* (1991) 233 Cal.App.3d 414, 417-419.) The probation officer’s report contains no information on defendant’s ability to pay, and the trial court gave no indication that it made the requisite findings. (*Self, supra*, at pp. 418-419; see *People v. Lawson* (1999) 69 Cal.App.4th 29, 38.)² As explained in *Leiva*: “Had the prosecutor alleged such a violation, and had the trial court determined that [the] defendant willfully failed to pay

² While, as the People argue, a defendant may forfeit a claim of error regarding ability to pay on appeal by failing to raise the issue in the trial court (*People v. Whisenand, supra*, 37 Cal.App.4th at pp. 1395-1396), the record must still contain “some reliable factual information from which the trial court can determine if a violation of probation has occurred.” (*People v. Campos, supra*, 198 Cal.App.3d at p. 921.)

restitution during the probationary period and that defendant had had the ability to pay at that time, a violation of probation based on failure to pay restitution could have been found at the formal probation hearing” (*Leiva, supra*, 56 Cal.4th at p. 516, fn. 6.)

It is clear that the trial court applied the incorrect legal standard in finding a probation violation and in revoking probation and sentencing defendant to prison when it relied on conduct occurring after the end of the probation period, or upon terms of probation with which defendant could not comply due to his deportation. In addition, the court did not make the required findings regarding defendant’s ability to pay the court-ordered fines. Because we are unable to determine whether the trial court would have reached the same result had it applied the correct legal standard, we conclude this abuse of discretion was prejudicial, requiring reversal of the order revoking probation and imposing sentence. (Cf. *People v. Robinson* (1964) 61 Cal.2d 373, 406.)

DISPOSITION

The order is reversed. The matter is remanded for further proceedings consistent with this opinion.

KEENY, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.